

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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JUN 3 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

PP Docket No. 93-253

PETITION FOR RECONSIDERATION

Cable & Wireless, Inc., (CWI) pursuant to 47 C.F.R. §1.429, seeks reconsideration and clarification of the Second Report and Order¹ in this proceeding as regards procedures for certifying compliance with the foreign ownership limitations and seeking and obtaining waivers therefrom. CWI asks that the Commission reconsider its rules that appear to mandate dismissal of Forms 175 not certifying compliance with the foreign ownership provisions of §310 of the Communications Act, notwithstanding the filing of a request for waiver or other relief that would establish compliance.² Instead, the Commission should permit

¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993) (NPRM); First Report and Order FCC 94-32 (Released February 4, 1994); Second Report and Order, FCC 94-61, 59 Fed. Reg. 22980 (May 4, 1994) (Second Report and Order); Third Report and Order, FCC 94-98 (Released May 10, 1994) (Third Report and Order); Fourth Report and Order, FCC 94-99 (Released May 10, 1994).

² Section 310(b)(4) of the Act permits the Commission to deny common carrier radio licensing to corporate applicants owned in excess of 25% by non-U.S. interests "if the Commission finds (continued...)"

participation at auction where the applicant certifies to the pendency of such a waiver request.

In its NPRM, the Commission proposed that short form applications must include certification of compliance with foreign ownership limitations and that applications failing to certify compliance with Commission rules would be dismissed.³ It asked, however, for

comment on procedures for applicants seeking waivers of the rules. Commenters should address in particular the relative advantages and disadvantages of ruling on such waiver requests prior to the auction, rather than after the auction was completed.

NPRM at para. 99.

In response to this invitation, CWI filed in support of comments endorsing pre-auction consideration of waiver requests.⁴ CWI pointed out the ambiguity created by the Commission's interpretation of §310(b)(4)⁵ and noted that pre-auction

²(...continued)
that the public interest will be served by the refusal or revocation of such license." The Commission has interpreted this language to require that it affirmatively "waive" foreign ownership limitations where foreign ownership exceeds the 25% benchmark. See Petition of Cable & Wireless, Inc., for a Declaratory Ruling Concerning the Application of Section 310(b)(4) of the Communications Act to United Kingdom Corporations, Public Notice, Rpt. No. I-6914, at 3-9 (January 12, 1993).

³ NPRM at paras. 96, 99.

⁴ Reply Comments of Cable & Wireless, Inc. (filed November 30, 1993). This position was also held by the Utilities Telecommunications Council (UTC) in its comments filed November 10, 1993.

⁵ CWI Reply Comments at 1-4.

processing is in the public interest because applicants will be more favorably positioned to obtain financing and to form alliances and partnerships. CWI also noted that the Commission would be less likely to be required to invalidate and reconduct an auction if waiver requests are considered prior to auction, conserving administrative resources.⁶ CWI also indicated its intent to seek a determination with regard to §310(b)(4) and United Kingdom corporations, which it filed in January 1994.⁷

In the Second Report and Order, the Commission adopted application processing procedures which it will use to create service-specific auction rules.⁸ The general rules codify the proposal to require short form applicants to certify as to §310 qualifications,⁹ and require dismissal with prejudice of applications failing to do so.¹⁰ There is no discussion of when waivers would be entertained or considered or reference to the request for comments in the NPRM. The Commission did not address the arguments elicited by its request for comment or provide a rationale for its apparent decision not to permit waiver requests in connection with the short form applications. Instead, CWI and

⁶ Id. at 4-6.

⁷ Id. at 6-8. See supra note 2.

⁸ Second Report and Order at para. 10.

⁹ Second Report and Order at para. 166 and 47 C.F.R. § 1.2105(a)(2)(vi).

¹⁰ Second Report and Order at para. 167 and 47 C.F.R. §1.2105(b)(1).

other potential applicants seeking eligibility waivers would appear to be excluded from the outset without recourse to other relief.

It is not entirely clear from subsequent orders that the Commission intended this harsh result. In the Third Report and Order, the Commission adopted auction rules for Narrowband PCS services which, while incorporating the general processing rules established in the Second Report and Order compelling dismissal of non-certifying applications,¹¹ expressly include a provision permitting applicants to seek rule waivers.¹² Nevertheless, it contains no description or discussion as to how one obtains a waiver of a certification requirement where a separate rule, §1.2105, appears to compel dismissal without exception. Read literally, the rules would require two petitions for waiver: one from the Form 175 processing rules and one substantive. This creates a double burden for both applicant and agency.¹³ Moreover, by creating a rule permitting waiver requests but procedures barring their consideration, the Commission has

¹¹ 47 C.F.R. §24.420, referencing §1.2105. Sec 24.420 compels dismissal of applications that do not comply with the Commission's rules, "[u]nless the Commission shall otherwise permit." Although derived from Part 22 of the rules, the Commission provides no guidance as to how this language would apply to auctions.

¹² 47 C.F.R. §24.419 (establishing necessary showings for grant of waivers).

¹³ If, on the other hand, the Commission intended to permit waiver requests only with regard to issues raised in post-auction long form applications, it would be creating a Catch 22 requiring success at auction in order to petition for a rule waiver necessary to participate at auction in the first place.

established a procedural right which the intended beneficiary class is unable to invoke.

On reconsideration, the Commission should clarify that Forms 175 will be found acceptable for filing if the applicant has either certified compliance as to eligibility under §310 or has requested affirmative relief which, if granted, would establish compliance. This would include applicants who have filed petitions for declaratory ruling comparable to that filed by CWI or who seek narrower relief on an application specific basis. The Commission should then act upon such petitions prior to auction for the reasons noted by CWI and UTC. If the Commission has not reached the merits of the waiver prior to auction, it should permit the applicant to participate and address the waiver if the applicant prevails.

The public interest would be served by adoption of these procedures on a generic basis applicable to all auctioned licenses and comports with other policy objectives. The Commission stated in the Second Report and Order that, in general, "the public interest would be better served by encouraging maximum bidder participation in auctions,"¹⁴ and greater numbers of participants could lead to greater revenues and would increase the number of capable applicants and potential licensees. Generic procedures would also create an additional element of regulatory certainty to facilitate business planning.

¹⁴ Second Report and Order at para. 167.

The spectrum auctions are a one-time opportunity. In order to ensure the widest possible participation and to speed the availability of services, the Commission should modify its procedural rules as proposed herein.

Respectfully submitted,

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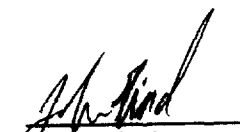
June 3, 1994

CERTIFICATE OF SERVICE

I, John Lind, hereby certify that I have caused copies of the foregoing "Petition" to be served this 3rd day of June, 1994, by first class mail, postage paid mail, postage prepaid, unless otherwise indicated, to the following:

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